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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

SUPERINTENDENT OF THE PENDLETON CORRECTIONAL FACILITY *et al.*,
Petitioners,
v.
RICHARD A. FRENCH *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,
v.
RICHARD A. FRENCH *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS SUPERINTENDENT OF THE PENDLETON CORRECTIONAL FACILITY *ET AL.*

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QUESTIONS PRESENTED

1. Whether a district court retains equitable authority to suspend the automatic stay provision of the Prison Litigation Reform Act.

2. Whether the automatic stay provision of the Prison Litigation Reform Act violates separation of powers principles.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

The administration of state prisons and local jails is a complex and difficult undertaking. Notwithstanding the Court's admonition that the lower federal courts are not to become "the primary arbiters of what constitutes the best solution to every administrative problem," *Turner v. Safley*, 482 U.S. 78, 89 (1987), federal courts have issued broad structural decrees which exceed constitutional norms and continue in effect long after officials have remedied any constitutional violations. *See, e.g., Lewis v. Casey*, 518 U.S. 343 (1996).

Congress enacted the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321-66–1321-77 (1996), to prevent protracted federal court interference with state prison administration. The provision at issue here, the automatic stay, is an essential part of PLRA as it directs a district court to rule on termination and modification motions within a reasonable time. *See* 18 U.S.C. § 3626(e). The United States' view that a federal court retains inherent equitable authority to stay the automatic stay finds no support in the statute's language and would nullify its purpose. And the court of appeals' view that the provision violates separation of powers principles is contradicted by the text of Article III and two centuries of congressional control over the jurisdiction of the lower federal courts.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

Because of the importance of these issues to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

A. The court of appeals correctly construed PLRA's automatic stay provision as "constrain[ing] the authority of the district courts to impose and sustain prospective relief." Pet. App. 25a.[2] The statute's text, structure, and legislative history provide conclusive evidence that Congress intended to foreclose a federal court's ability to stay the operation of the automatic stay beyond a 60-day postponement. Under PLRA federal courts cannot maintain an injunctive order in effect in the absence of written findings which establish the legal basis for continuing the decree.

The text of § 3626(e)(2) states that "[a]ny motion to modify or terminate prospective relief . . . *shall* operate as a stay during the period . . . beginning on the 30th day after such motion is filed . . . and . . . ending on the date the court enters a final order ruling on the motion." 18 U.S.C. § 3626(e)(2) (emphasis added). It is apparent that Congress intended the term "shall" to be given its meaning in common usage. "In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation." *Black's Law Dictionary* 1375 (6th ed. 1990). *See also Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). The fact that Congress characterized the stay as "automatic," 18 U.S.C. §§ 3626(e)(2), (3), (4), reinforces the conclusion that the stay is mandatory.

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[2] All references to "Pet. App." in this brief are to the appendix to the petition for certiorari filed by the Superintendent of the Pendleton Correctional Facility *et al.* (No. 99-224).

The mandatory nature of the stay is also confirmed by the structure of the PLRA. Elsewhere in subsection (e), Congress expressly provided that a "court may postpone the effective date of [the] automatic stay . . . for not more than 60 days for good cause." *Id.* § 3626(e)(3). This express grant of limited discretion counsels against implying any greater exemption from the mandatory operation of the automatic stay and also demonstrates Congress' awareness, when enacting the PLRA, of the difference between "shall" and "may." *See Anderson*, 329 U.S. at 485.

Contrary to the views of the United States, Congress' authorization of an interlocutory appeal of orders staying the stay, *see id.* § 3626(e)(4), does not "impl[y] that district courts have authority to issue such orders." U.S. Pet. 16. As originally enacted, PLRA contained no provision for interlocutory review. The provision was added in response to several lower court decisions holding the automatic stay unconstitutional, to ensure that such decisions would be immediately appealable notwithstanding their interlocutory nature.

B. The automatic stay provision does not violate separation of powers principles. The Constitution expressly gives Congress the authority to regulate the equitable jurisdiction of the lower federal courts. *See* U.S. Const. art. III, § 1. "There can be no question of the power of Congress . . . to define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E. G. Shinner & Co., Inc.*, 303 U.S. 323, 330 (1938).

Congress has exercised its power to limit the equity jurisdiction of the lower federal courts in a number of ways. It has prohibited the courts from exercising equitable jurisdiction over entire categories of cases. *See* 28 U.S.C. § 2283 (Anti-Injunction Act). It has limited the authority of the federal district courts to issue interlocu-

tory injunctions. *See Yakus v. United States*, 321 U.S. 414 (1944). Finally, Congress can impose time limits on the issuance of equitable decrees and require federal courts to make findings as a prerequisite to the issuance of an injunction, as it did in the Norris-LaGuardia Act. *See* 29 U.S.C. § 107.

Nor does the automatic stay provision violate the Constitution because, as the court of appeals put it, Article III " 'gives the Federal Judiciary the power, not merely to rule on cases,' but to *decide* them, subject to review only by superior courts in the Article III hierarchy.' " Pet. App. 29a (citation omitted). The automatic stay provision does not intrude on the power of federal courts to decide a case. Indeed, the whole point of § 3626(e)(2) is to encourage the court to decide the case.

That sub-section (e) directs that an order be suspended in the absence of the required findings within 90 days—subject to later reimposition if those findings are made—does not render it an "unconstitutional intrusion on the power of the courts to adjudicate cases." Pet. App. 29a. The "federal remedial power may be exercised 'only on the basis of a constitutional violation.' " *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (citation omitted). Congress, like the courts, is empowered to weigh the equities and conclude that the continuance of injunctions that are unsupported by the constitutionally required findings is contrary to the public interest. Requiring suspension of a decree when a court fails to make the constitutionally required findings is not a "usurpation of judicial functions" in violation of Article III. *Yakus*, 321 U.S. at 442.

Nor does the automatic stay unconstitutionally prescribe a rule of decision in a pending case in violation of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). "Whatever the precise scope of *Klein*, . . . its prohibition does not take hold when Congress amend[s] applicable law." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)

(citation and internal quotation omitted). Indeed, it is well established that when Congress changes the applicable law, a court of equity errs when it refuses to modify a continuing injunction. If amending the substantive law applicable to a continuing injunction does not violate the separation of powers, Congress surely can adopt procedures to protect the rights of parties who are entitled to the benefit of the new law. Because administrators and the public would otherwise have no adequate remedy where a federal court continues an invalid injunction, Article III, Section 1, empowers Congress to protect the public interest by requiring a federal court either to rule or stay the decree.

ARGUMENT

PLRA'S AUTOMATIC STAY PROVISION, CORRECTLY CONSTRUED BY THE COURT OF APPEALS, DOES NOT VIOLATE SEPARATION OF POWERS PRINCIPLES

As the Court recognized more than twenty years ago,

> courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, . . . no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination.

Bell v. Wolfish, 441 U.S. 520, 562 (1979). *See also Procunier v. Martinez*, 416 U.S. 396, 405 (1974) ("[T]he problems of prisons in America are complex and intractable, and . . . are not readily susceptible of resolution by decree. . . . [C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."); *Lewis v. Casey*, 518 U.S. 343, 362 (1996).

Notwithstanding the Court's admonitions in *Bell* and *Procunier*, some federal courts have continued to assert

broad authority to micromanage the operations of state and local prisons and jails. *See Lewis*, 518 U.S. at 346-48, 355 n.5 (discussing district court order); *Ruiz v. Estelle*, 666 F.2d 854, 862-73 (5th Cir. 1982) (reprinting district court's injunction against Texas Department of Corrections); *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1422-26 (N.D. Cal. 1984) (injunction applicable to California's Folsum & San Quentin prisons).[3] In some instances, federal courts have ordered relief which has resulted in serious harm to the public. *See* 141 Cong. Rec. S 14414 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (in Philadelphia, "a court-ordered prison cap has put thousands of violent criminals back on the city's streets" and "turn[ed] the town into a major drug smuggling port") (internal quotation and citation omitted).[4] And several federal courts have ordered broad, far-reaching injunctive relief, disregarding the limitations on the equitable powers of federal courts established by this Court's jurisprudence. *See, e.g., Lewis*, 518 U.S. at 347-48; 357-60.

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[3] *See also* David Schoenbrod & Ross Sandler, *Rule of Law: In New York City, the Jails Still Belong to the Judges*, Wall St. J., Sept. 10, 1997, at A23, *available in* 1997 WL-WSJ 14165674 (describing court order governing New York City's jails as "a hodgepodge of serious remedies mixed with the wishes of those at the negotiating table: Only licensed barbers are allowed to cut hair, coffee already sugared may never be served at meals. Boraxo should be used to clean showers, the court-appointed jail monitor must be given a city car within one grade of the prison commissioner's").

[4] According to the Wall Street Journal, Prof. John DiIulio found that "67% of those released [because of the Philadelphia order] failed to appear for trial." Editorial, *Criminal Oversight*, Wall St. J., June 19, 1996, at A18, *available in* 1996 WL-WSJ 3106141. In one 18-month period, "9,732 arrestees out on the streets because [of the order] were arrested on second charges, including 79 murders, 90 rapes, 701 burglaries, 959 robberies, 1,113 assaults, 2,215 drug offenses and 2,748 thefts." *Id.*

It is axiomatic that "[a] federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy.'" *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971)). *Accord Lewis*, 518 U.S. at 357 (quoting *Missouri v. Jenkins*, 515 U.S. 70, 88, 89 (1995)). The Court has further explained that in cases involving state institutions, injunctive relief "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Missouri v. Jenkins*, 515 U.S. at 98 (quoting *Milliken v. Bradley*, 433 U.S. 267, 281 (1977)). A corollary of these principles is that injunctive relief "should be no broader and last no longer than necessary to remedy the discrete constitutional violation." *Lewis*, 518 U.S. at 393 (Thomas, J., concurring); *see also Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977) ("Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'") (quoting *Swann*, 418 U.S. at 744); *cf. Board of Ed. of Oklahoma City v. Dowell*, 498 U.S. 237, 247 (1991) ("federal supervision of local school systems was intended as a temporary measure to remedy past discrimination").

To "help restore balance to prison conditions litigation and . . . ensure that Federal court orders are limited to remedying actual violations of prisoners' rights," 141 Cong. Rec. S 14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch), Congress enacted the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321-66 to 1321-77 (1996). *See* H.R. Rep. No. 104-21, at 8, 23-26 (1995); 141 Cong. Rec. S 14413 (daily ed. Sept. 27, 1995). PLRA prohibits a federal court from ordering injunctive relief in prison condition

cases "unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1).

PLRA also provides for the re-examination of existing decrees by providing for their termination, at certain intervals, "upon the motion of any party or intervener." *Id.* § 3626(b)(1). Under Section 3626(b)(2), "a defendant . . . shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."

The statute provides, however, that "[p]rospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." *Id.* § 3626(b)(3). PLRA thus preserves the authority of the federal courts to continue an injunction when necessary to remedy actual violations of federal rights. Moreover, the standard which PLRA prescribes for ordering or continuing injunctive relief does no more than codify the standards which this Court has articulated in its cases. *See, e.g., Lewis*, 518 U.S. at 357; *Milliken*, 418 U.S. at 717.

PLRA further enacted a procedure for ruling on termination and modification motions. First, Congress instructed that a federal court "shall promptly rule on any motion to modify or terminate prospective relief" in a

prison condition case and that "[m]andamus shall lie to remedy any failure to issue a prompt ruling on such a motion." 18 U.S.C. § 3626(e)(1). Second, Congress provided that "[a]ny motion to modify or terminate prospective relief made under [§ 3626(b)] shall operate as a stay during the period . . . beginning on the 30th day after such motion is filed . . . and . . . ending on the date the court enters a final order ruling on the motion." *Id.* § 3626(e)(2). Congress authorized a court to "postpone the effective date of an automatic stay . . . for not more than 60 days for good cause," but excluded "general congestion of the court's calendar" as a "permissible" cause. *Id.* § 3626(e)(3). Finally, Congress provided for interlocutory review under 28 U.S.C. § 1292(a)(1) of "[a]ny order staying, suspending, delaying, or barring the operation of the automatic stay." 18 U.S.C. § 3626(e)(4).

A. PLRA's Automatic Stay Provision Precludes A Federal Court From Invoking Traditional Equitable Standards To Maintain In Effect An Existing Decree Which Is Unsupported By The Necessary Findings

The court of appeals correctly construed PLRA's automatic stay provision as "constrain[ing] the authority of the district courts to impose and sustain prospective relief." Pet. App. 25a. The United States and the Fifth and Sixth Circuits are simply wrong in interpreting the statute as not displacing the authority of the federal courts "to suspend the automatic stay based on traditional equitable standards." U.S. Pet. 9 (citing *Ruiz v. Johnson*, 178 F.3d 385 (5th Cir. 1999) and *Hadix v. Johnson*, 144 F.3d 925 (6th Cir. 1998)). Moreover, the United States' reading is not supported by "the principle that a statute should be construed to avoid a serious constitutional question, when such a construction is fairly possible." *Id.* at 17 (citations omitted). The text and structure of PLRA make inescapable the conclusion that Congress intended

that a decree which is not supported by the proper findings be suspended after ninety days, subject to the court's power to reimpose it upon making the required findings. The United States' view that federal courts can nonetheless stay the automatic stay would subvert Congress' carefully crafted scheme. And as explained in part B below, PLRA's automatic stay provision is constitutional.

The Court has long recognized that the power of Congress to ordain and establish courts subordinate to the Supreme Court "carries with it the power to prescribe and regulate [the] modes of proceedings in such courts." *Livingston v. Story*, 43 U.S. (9 Pet.) 632, 656 (1835). More recently the Court has observed that "Congress has undoubted power to regulate the practice and procedure of the federal courts." *Sibbach v. Wilson*, 312 U.S. 1, 655, 9 (1941). This power necessarily includes the authority to prescribe procedures that the federal courts must follow in exercising their equitable powers.

To be sure, the Court has explained that "the comprehensiveness of [the] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." *Porter v. Warner Holding Co.*, 327 U.S. 395, 398 (1946); *see also Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The Court has further stated that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter*, 327 U.S. at 398; *see also Hecht Co.*, 321 U.S. at 330 ("a major departure" from traditional equity practice "should [not] be lightly implied"); *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836) ("The great principles of equity should not be yielded to light inferences, or doubtful construction.").

The text, structure, and legislative history of PLRA, however, provide conclusive evidence that Congress intended to foreclose a federal court's ability to stay the operation of the automatic stay and thereby maintain the status quo beyond the ninety-day period in the absence of written findings which establish the legal basis for continuing the decree. "Courts have no power to presume and remediate harm that has not been established." *Lewis*, 518 U.S. at 360 n.7. And while federal courts enjoy "inherent authority to issue interim equitable relief to preserve the status quo" while a case is pending, U.S. Pet. 12, courts can abuse this power. *Cf. Moore's Federal Practice* ¶ 65.02 & n.6 (1999) (Fed. R. Civ. P. 65 was adopted to "guard[] against abuse of the injunction remedy"). It is fully within the authority of Congress to determine that the public interest is best served by requiring the suspension of an existing decree unless and until a court makes the constitutionally required findings.

That is exactly what Congress did here. The text of Section 3626(e)(2) states that "[a]ny motion to modify or terminate prospective relief . . . *shall* operate as a stay during the period . . . beginning on the 30th day after such motion is filed . . . and ending on the date the court enters a final order ruling on the motion." 18 U.S.C. § 3626(e)(2) (emphasis added). The United States' contention that this provision "is most naturally read as permitting" the district court to "preserv[e] the status quo by suspending the automatic stay," U.S. Pet. 13, is irreconcilable with the statute.

It is apparent that Congress intended the term "shall" to be given its meaning in common usage. "In common or ordinary parlance, and its ordinary signification, the term 'shall' is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means 'must' and

is inconsistent with a concept of discretion." *Black's Law Dictionary* 1375 (6th ed. 1990). *See also Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) ("The word 'shall' is ordinarily '[t]he language of command.'")); *Webster's New Collegiate Dictionary* 1064 (1975) ("used in laws, regulations, or directives to express what is mandatory"); *The American Heritage Dictionary Of The English Language* 1189 (1979) ("Compulsion, with the force of *must*, in statutes").

Two additional textual indications confirm that subsection (e)(2)'s use of the term "shall" does not mean "may." First, Congress characterized the stay as "automatic." *See* 18 U.S.C. §§ 3626(e)(2), (3), (4). In common usage, that term expresses Congress' intent that the stay be issued as a matter of course and is not discretionary. *See The American Heritage Dictionary*, at 89-90 (defining "automatic" as "[a]cting or operating in a manner essentially independent of external influence or control"); *Webster's New Collegiate Dictionary*, at 76 (defining "automatic" as "largely or wholly involuntary" or "mechanical").

Second, Congress provided that a "court may postpone the effective date of the stay . . . for not more than 60 days for good cause." *Id.* § 3626(e)(3). This limited grant of discretion excludes construing the statute to allow a court to further postpone the stay for two reasons. As a textual matter, it demonstrates that Congress was fully cognizant of the distinction between the terms "shall" and "may." Because Congress used both terms in the same subsection, each term should be construed in accordance with its commonly accepted meaning.[5] *See Anderson*,

[5] While "[t]he court may postpone the effective date of the automatic stay . . . for good cause[,] [n]o postponement shall be permissible because of general congestion of the court's calendar." 18 U.S.C. § 3626(e)(3). Subsection (e)(3) further demonstrates that Congress was fully aware of the distinction between the terms "shall" and "may" and intended each term to be given its meaning in common parlance.

329 U.S. at 485 ("[W]hen the same Rule uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory.").

Most significantly, as a limited grant of discretion, subsection (e)(3) counsels against implying any greater exemption from the mandatory operation of the stay. As the Court has recognized, where Congress grants authority to do a thing a certain way, it implicitly prohibits the doing of the thing in any other way. *See Smith v. Stevens*, 77 U.S. (10 Wall.) 321 (1870); *United States v. Smith*, 499 U.S. 160, 167 (1991) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in theabsence of a contrary legislative intent.")).

Furthermore, the "good cause" that justifies postponement of the stay, 18 U.S.C. § 3626(e)(3), is inclusive of the equitable considerations which the United States contends allow a court to suspend the automatic stay. *See* U.S. Pet 15. A showing that one is likely to suffer irreparable harm and to defeat a termination motion demonstrates "good cause." A court that has been presented with such a showing should be able to make the findings required to deny a termination motion within the ninety-day period, *see* 18 U.S.C. § 3626(b)(3), as the court is authorized to appoint a special master "to conduct hearings on the record and prepare proposed findings of fact." *Id.* § 3626(f)(1).

That Congress authorized an interlocutory appeal of "[a]ny order staying, suspending, delaying, or barring the operation of the automatic stay," 18 U.S.C. § 3626(e)(4), does not "impl[y] that district courts have authority to issue such orders." U.S. Pet. 16. Congress enacted PLRA in response to numerous instances of federal judicial overreaching. *See* House Report No. 104-21, at 25-27; 141 Cong. Rec. S 14626 (daily ed., Sept. 29, 1995) (Statements of Sens. Dole & Hatch). Given this record, Congress could reasonably anticipate that PLRA's reforms would be resisted by federal judges who would seek to circumvent the operation of the automatic stay either by declaring it unconstitutional[6] or by asserting—as the United States does—that the statute does not limit their equitable authority.

Indeed, as originally enacted, Section 3626(e) contained no provision for interlocutory review. *See* Pub. L. 104-134, Title I, § 101(a), 110 Stat. 1321-66. As Senator Abraham, who shepherded the 1997 amendment which added subsection 3626(e)(4), explained:

> Courts have also been avoiding the automatic stay by saying that it is impossible to comply with because it sets up an impossible timetable and that it is therefore unconstitutional. The Department of Justice meanwhile has contended that the stay is not really automatic at all, although no court has accepted that view.

[6] Administrators' attempts to invoke PLRA were greeted by numerous challenges on various constitutional grounds. *See, e.g., Dougan v. Singletary*, 129 F.3d 1424, 1425-27 (11th Cir. 1997); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 655-61 (1st Cir. 1997); *Gavin v. Branstad*, 122 F.3d 1081, 1084 (8th Cir. 1997); *Plyler v. Moore*, 100 F.3d 365, 368 (4th Cir. 1996). It was thus forseeable that the automatic stay amendment would likewise be subjected to challenges.

143 Cong. Rec. S 12269 (daily ed., Nov. 9, 1997).[7] Thus, subsection (e)(4) does not "impl[y] that district courts have authority to issue" orders suspending the automatic stay. U.S. Pet. 16. Rather, subsection 3626(e)(4) was enacted to ensure that decisions of courts which had invalidated the stay would be immediately appealable notwithstanding their interlocutory nature.

Furthermore, the United States mischaracterizes the history of PLRA when it states that "[a]t the same time that Congress provided for *appeal* of an order suspending the automatic stay, it also provided for review by *mandamus* of a court's failure to perform the duty to issue a prompt ruling on a motion for termination." U.S. Pet. 16. PLRA, however, originally contained no provision for appellate review other than by mandamus. Subsection (e)(4) was added to ensure that orders circumventing the stay would be treated as immediately appealable. Indeed, one month before subsection (e)(4) was proposed, the Fifth Circuit in *Ruiz v. Johnson* refused to review the district court's holding that the automatic stay provision was unconstitutional. *See* 178 F.3d at 388. Congress thus enacted the provision in direct response to decisions such as *Ruiz*.[8] Subsection (e)(4) therefore does not reflect

[7] The district court in *Ruiz v. Johnson* had invalidated the automatic stay provision as violative of separation of powers principles sometime in late 1996 or early 1997. *See Ruiz v. Johnson*, 178 F.3d 385, 388 (5th Cir. 1999). Moreover, in *Hadix v. Johnson*, the federal courts for both the Eastern and Western Districts of Michigan had invalidated the automatic stay as violative of separation of powers principles and the Due Process Clause of the Fifth Amendment. *See Hadix v. Johnson*, 144 F.3d 925, 932 (6th Cir. 1998) (citing *Hadix v. Johnson*, 933 F. Supp. 1360 (E.D. Mich. 1996); *Hadix v. Johnson*, 933 F. Supp. 1362 (W.D. Mich. 1996)).

[8] Given the limitations on interlocutory appeals under 28 U.S.C. § 1292(a)(1), a stay of the stay was likely not properly appealable without explicit Congressional authorization. While a stay might well be viewed as having "the practical effect" of continuing an

Congress' "recognition that an order suspending the automatic stay is within the authority of a district court," U.S. Pet. 16-17, or imply that district courts have authority to invoke general equitable principles to stay the stay beyond the ninety-day time period.[9]

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injunction, *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981), it is unlikely that prison officials could convince federal courts that the order, which in practical effect results in requiring officials to maintain the status quo, would have the " 'serious, perhaps irreparable, consequence,' that is a prerequisite to appealability under § 1292(a)(1)." *Id.* at 85.

[9] The United States asserts that "[t]he court of appeals attempted to explain the provision for appellate review as a mechanism for ensuring prompt reversal of all orders suspending the automatic stay," to suggest that "[i]f that were Congress's intent . . . it would have provided for appellate correction through mandamus." U.S. Pet. 16. Contrary to the suggestion of the United States, the court of appeals viewed the interlocutory appeal provision as providing a mechanism for prompt resolution of the constitutionality of the automatic stay. As the court explained, "[t]he drafters of the PLRA realized that they were skating close to the line in (e)(2), and they wanted to ensure that the issue that is now before us could be resolved in an interlocutory appeal." Pet. App. 23a. As explained above, this view is amply supported by the history of § (e)(4), which demonstrates that it was enacted in response to several decisions holding § (e)(2) unconstitutional.

The United States' contention that Congress would have provided for mandamus as the method to "ensur[e] prompt reversal of all orders suspending the automatic stay," U.S. Pet. 16, is irreconcilable with the nature of mandamus. Mandamus is an extraordinary remedy and "should be resorted to only where appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). "[T]he party seeking mandamus has 'the burden of showing that its right to issuance of the writ is "clear and indisputable." ' " *Will v. United States*, 389 U.S. 90, 96 (1967) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899))). Furthermore, "mandamus is governed by equitable considerations and is to be granted only in the exercise of sound discretion." *Whitehouse v. Illinois Cent. R.R. Co.*, 349 U.S. 366, 373 (1955). Providing a remedy of mandamus to review orders staying the stay would thus lead to the same problems Congress sought to rectify in enacting PLRA.

In sum, under Congress' carefully crafted scheme a federal court can continue in force an existing decree for up to ninety days without making any further findings; it can renew the decree by making the findings which are constitutionally required to support it. Adopting the United States' construction of the automatic stay provision would result in the paradox that preliminary injunctive relief awarded subsequent to PLRA's enactment "shall automatically expire . . . 90 days after its entry" absent a court's making the required findings, 18 U.S.C. § 3626(a)(2), but a pre-existing decree could continue indefinitely without findings.[10] This makes little sense given that a district court will, in most cases, already have substantial knowledge of the circumstances which led to an existing decree and have less need for additional time to make the findings necessary to support the denial of a termination motion. *See* 18 U.S.C. § 3626(b)(3). That section 3626(f)(1) authorizes the court to appoint a special master "to conduct hearings on the record and prepare proposed findings of fact" demonstrates that Congress meant what it said—that if the court does not make the required findings within the ninety-day period, the decree must be suspended.[11] Indeed, motions for preliminary injunctive relief are frequently consolidated with accelerated trials on the merits. Charles A. Wright &

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[10] Adopting the United States' position would likely lead to similar attempts to circumvent the plain meaning of section 3626 (a)(2)'s command that "[p]reliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1)."

[11] The automatic stay operates only until "the court enters a final order ruling on the motion." 18 U.S.C. § 3626(e)(2)(B). Where the unconstitutional conditions which prompted a decree no longer exist, there is no justification for requiring officials to continue to comply with its terms. Where conditions still violate the Constitution, the court will deny the motion to terminate the decree.

Arthur Miller, *Federal Practice & Procedure* § 2950, at 233 (1982).

It is likewise hard to see what purpose is served by allowing federal courts to stay the stay even if such an order is subject to traditional equitable standards. While the prisoners would have to show "a substantial likelihood of ultimate success on the merits," *Moore's Federal Practice*, § 65.22[1], at 65-52, there will still be many cases in which the State prevails after a trial. The State will, however, be unable to obtain redress for the harm it suffers where an injunction is maintained even after the violations have been corrected.

Moreover, where violations of federal law have not been remedied, the prisoners are not required to wait until the State files a termination motion to seek additional relief. Prisoners retain the right to secure compliance with a valid decree at all times and to bring to the court's attention new violations of federal law. There is thus no need for courts to stay the stay. Allowing courts to do so would remove the incentive for prompt decisionmaking which the statute creates.

This case amply demonstrates why Congress meant what it said. Here, the State moved for termination in June 1997. Today, nearly three years later, the district court still has not ruled on the State's motion. *See* Pet. App. 36a. Adopting the United States' reading would thus serve neither the interests of the State nor of the prisoners.[12] In short, it would render the statute precatory much as the panel below ultimately did. *See* Pet.

[12] Nor do federal courts need the authority to stay the stay to protect prisoners against stalling tactics. As Judge Easterbrook explained, "Courts can foil delaying maneuvers by imposing sanctions on parties that fail to cooperate in discovery, *see* Fed. R. Civ. P. 37, and by drawing adverse inferences about missing evidence. The inference then could support a finding under § 3626(b)(3)." Pet. App. 38a.

App. 30a. The Court should reject this reading, which flies in the face of Section 3626's clear and unambiguous text.

B. The Automatic Stay Provision Does Not Violate Separation Of Powers Principles

While the court of appeals correctly construed section 3626(e), it erred in holding that the automatic stay provision violates separation of powers principles. In the court of appeals' view, subsection (e) violates these principles for two reasons. First, "[i]t strips from the court the authority to decide whether the status quo . . . should be continued or modified pending the court's decision on the immediate termination petition." Pet. App. 25a. According to the court, " 'the Framers crafted [Article III] . . . with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy.' " *Id.* at 29a (quoting *Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211, 218-19 (1995)). In the court of appeals' view, "(e)(2) places the power to review judicial decisions outside of the judiciary: it is a self-executing legislative determination that a specific decree of a federal court . . . must be set aside at least for a period of time, no matter what the urgency of keeping it in place." *Id.* According to the court below, "[t]his amounts to an unconstitutional intrusion on the power of the courts to adjudicate cases." *Id.*

Second, the court of appeals reasoned "that (e)(2) violates the principle articulated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871)." *Id.* In the court's view, the automatic stay unconstitutionally prescribes a rule of decision in a pending case because for the period during which the termination motion is pending, "the statute does mandate a particular rule of decision: the prospective relief must be terminated." *Id.* at 30. Ac-

cording to the court, "this falls comfortably within the rule of *Klein*, and as such, it exceeds the power of the legislative branch." *Id.*

Neither of these rationales are persuasive. The separation of powers does not render Congress powerless to respond if district judges exceed their equitable jurisdiction. To the contrary, the Constitution expressly gives Congress the authority to regulate the equitable jurisdiction of the lower federal courts. As Article III, Section 1, states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

"There can be no question of the power of Congress . . . to define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). The Court has thus recognized that "[t]he Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)). The Court has further explained that:

> Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated

> cases, but it requires an act of Congress to confer it. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part . . . .

Kline v. Burke Const. Co., 260 U.S. 226, 234 (1922) (citations omitted).

Congress has exercised its power to restrict the exercise of the equity jurisdiction in various ways. First, it can prohibit the federal courts from exercising equitable powers over entire categories of cases, as it did in the Anti-Injunction Act, enacted in 1793. *See* Act of Mar. 2, 1793, § 5, 1 Stat. 335 (now codified at 28 U.S.C. § 2283) (limiting federal courts' authority to enjoin state court proceedings). *See also* 28 U.S.C. § 1342 (Johnson Act) (limiting federal district court authority to enjoin state public utility rate orders); 28 U.S.C. § 1341 (Tax Injunction Act) (limiting federal district court authority to enjoin the collection of state taxes).

Second, Congress can exercise its constitutional power to limit the authority of federal district courts to issue interlocutory injunctions. *See* Richard H. Fallon *et al.*, *Hart and Wechsler's The Federal Courts And The Federal System* 1212 (4th ed. 1996) (discussing enactment of since-repealed 28 U.S.C. § 2281, which created three-judge district courts in response to "the particular abuses of *ex parte* restraining orders and interlocutory injunctions" in the aftermath of *Ex Parte Young*, 209 U.S. 123 (1908)).

In the Emergency Price Control Act of 1942, 56 Stat. 23, Congress "vest[ed] jurisdiction to grant equitable relief exclusively in the Emergency Court [of Appeals] and in" this Court, removing from all other courts equitable authority to stay or enjoin the administrator's regulations. *Lockerty*, 319 U.S. at 186-87. The Act also prohibited

all interlocutory injunctive relief. *See Yakus v. United States*, 321 U.S. 414, 428 (1944).

Yakus rejected a challenge to the latter prohibition. The Court noted that "[t]he award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff." *Id.* at 440. The Court further observed that "where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Id.* According to the Court, "[t]his is but another application of the principle . . . that 'Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Id.* at 441 (quoting *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 552 (1937)).

Yakus further makes plain that prohibiting interlocutory injunctive relief is fully within Congress' "power to define the jurisdiction of inferior federal courts," *id.* at 443, and that Congress does not violate separation of powers principles in doing so.

> In so doing [Congress] has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest. What the courts do Congress can do as the guardian of the public interest of the nation in time of war. The legislative formulation of what would otherwise be a rule of judicial discretion is not . . . a usurpation of judicial functions.

Id. at 441-42.

Finally, Congress can impose time limits on the issuance of an equitable decree and require a federal court to make findings as a prerequisite to entering an injunction, as it did in the Norris-LaGuardia Act. *See Lauf*, 303 U.S. at 329-30. Under that act, a district court can issue a temporary restraining order which "shall be effective for no longer than five days and shall become void at the expiration of said five days." 29 U.S.C. § 107. Furthermore, "[n]o court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after findings of fact by the court" as specified in the statute.[13] *Id.*

In *Lauf*, the Court reversed an injunction which the district court had granted "in the absence of findings which the Norris-LaGuardia Act makes prerequisites to the exercise of jurisdiction." *Id.* at 329 (footnote omitted). Observing that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States," the Court held that "[t]he District Court made none of the required findings save as to irreparable injury and lack of remedy at law. It follows that in issuing the injunction it exceeded its jurisdiction." *Id.* at 330 (citing *Kline*, 260 U.S. at 233, 234).

As the foregoing demonstrates, for more than two centuries it has been the accepted understanding that Article

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[13] The Norris-LaGuardia Act was enacted to prohibit federal courts from issuing injunctive relief enforcing "yellow-dog" contracts. As Hart & Wechsler explains, "[a]t the time of [its] adoption, *Truax v. Corrigan*, 257 U.S. 312 (1921), had found state legislation similarly limiting employers' remedies to be unconstitutional." *Federal Courts*, at 363. The Court had previously "found a due process right to condition employment on an undertaking not to join a labor union or on non-membership." *Id.* at 364 (citing *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908)).

III, Section 1, grants Congress broad power to limit the equitable jurisdiction of the lower federal courts. Contrary to the views of the court of appeals, sub-section (e)(2) cannot violate Article III as "an unconstitutional intrusion on the power of the courts to adjudicate cases," Pet. App. 29a, when text and history demonstrate that Article III, § 1, commits to Congress the power to regulate the lower federal courts' exercise of their equitable authority. And whether or not there are any other limits on Congress' power in this regard, PLRA's automatic stay provision is an unexceptionable exercise of this power.

Sub-section (e)(2) does not totally divest the federal courts of equity jurisdiction over prison condition cases although Congress clearly can do so. *Cf.* 28 U.S.C. § 2283. Nor does it deny a federal court the power to maintain the status quo following the State's filing of a termination motion, even though Congress clearly has the power to prohibit interlocutory relief. *See Yakus*, 321 U.S. at 441-42. Rather, the automatic stay allows a court to award the functional equivalent of interlocutory relief, subject to a temporal limitation. Sub-section (e)(2)'s grant of authority to a court to postpone the stay is analogous to the time limitations on equitable relief imposed on the federal courts in the Norris-LaGuardia Act, 29 U.S.C. § 107 (limiting TRO to five days), and the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 65 (limiting TRO to ten days and one extension), which as a practical matter require the court to conduct a hearing and make findings in order to impose further equitable relief through an injunction.

The court of appeals dismissed these time limits as "respond[ing] to the particular problems of *ex parte* proceedings." Pet. App. 24a. But that is beside the point. These rules demonstrate that Congress can impose time

limits on interim relief. Given that a total prohibition of interlocutory injunctive relief by Congress is not "a usurpation of judicial functions," *Yakus*, 321 U.S. at 442, neither is a time limit on a court's ability to preserve the status quo.[14]

No more persuasive is the court of appeals' contention that sub-section (e)(2) violates the structural independence of the judiciary because Article III "'gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy.'" Pet. App. 29a (quoting *Plaut*, 514 U.S. at 218-19). The automatic stay provision does not, however, intrude on the power of the federal courts to decide a case. Indeed, the whole point of sub-section (e)(2) is to encourage the court to decide the case as the stay "end[s] on the date the court enters a final order ruling on the motion."[15] 18 U.S.C. § 3626(e)(2)(B). If conditions warrant continuing the injunction, the court must make the constitutionally required findings. *See id.* § 3626(b)(3).

That sub-section (e) directs the suspension of an existing decree where the judge has not rule in the allotted

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[14] The court of appeals also stated that congressionally imposed time limits on executive agencies are "of little assistance" because "[w]here agencies are involved, the judgments . . . were not rendered by Article III courts but by entities that the Constitution places under the control of Congress." Pet. App. 27a. As explained above, the view implicit in this suggestion—that the federal courts are beyond the control of Congress—is refuted by the text of Article III and two centuries of congressional regulation of their jurisdiction and procedure.

[15] As the House Report explained:

> under current law, there is little that the parties can do to require or even encourage the judge to rule on their request. By providing that the prospective relief that is subject to the motion will be stayed if the motion is not decided promptly, judges will be motivated to decide the motions and avoid having the stay automatically take effect.

House Report at 26 (footnote omitted).

time does not render it an "unconstitutional intrusion on the power of courts to adjudicate cases." Pet. App. 29a. This argument ignores the settled principle that injunctive relief "should be no broader and last no longer than necessary to remedy the discrete constitutional violation." *Lewis*, 518 U.S. at 393 (Thomas, J., concurring). The "federal remedial power may be exercised 'only on the basis of a constitutional violation.'" *Milliken*, 418 U.S. at 738 (quoting *Swann*, 402 U.S. at 16). The requirement of a current constitutional violation is an "inherent limitation upon federal judicial authority." *Oklahoma City Bd. of Ed.*, 498 U.S. at 247 (quoting *Milliken*, 433 U.S. at 282). Just as "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution," *id.* (quoting 433 U.S. at 282), so too do decrees which remain in effect once the State has remedied a constitutional violation.

Having found that state and local officials "are often handcuffed in their efforts to modify or terminate unnecessary and burdensome consent decrees . . . by judge[s] who stonewall and simply refuse, for many months or even years, to issue a ruling on a request for modification or termination," House Report at 26, Congress "has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest." *Yakus*, 321 U.S. at 441-42. Congress could rightfully conclude that prison officials will act in good faith in seeking to terminate or modify existing decrees. Indeed, prison officials have little to gain and much to lose (such as damaged credibility and attorneys' fees) if they move to terminate when conditions continue to violate the Constitution.[16]

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[16] It is erroneous to characterize the automatic stay as "a legislatively commanded, self-executing stay of an existing court order." Pet. App. 32a. *See also id.* at 29a; U.S. Pet. 17. Sub-section (e)(2) does not, by itself, stay all existing decrees in prison condition cases. Rather, it stays an existing decree only where a party has moved to modify or terminate. *See* 18 U.S.C. § 3626(e)(2). Furthermore, a court retains power to prevent the stay from going into effect either by postponing its effective date, *see id.* § 3626(e)(3), or by "enter[ing] a final order ruling on the motion." *Id.* § 3626(e)(2)(B). A court thus retains power to decide the case under the applicable substantive law.

Nor is § (e)(2) directed at any "specific decree." *See* Pet. App. 29a (describing § (e)(2) as "a self-executing determination that a specific decree of a federal court—here the decree addressing conditions at Pendleton—must be set aside").

"[W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Id.* at 440. Congress, as much as the courts, can weigh the equities and conclude that the continuance of injunctions which are unsupported by new findings causes undue harm to the public interest which outweighs the interest of prisoners. Requiring suspension of a decree when a court fails to make the constitutionally required findings is not a "usurpation of judicial functions" in violation of Article III. *Id.* at 442.

As for the court of appeals' other rationale, *Klein* is simply inapposite. "Whatever the precise scope of *Klein*, . . . its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut*, 514 U.S. at 218 (quoting *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992)). Indeed, it is well established that when Congress changes the applicable law, a court of equity cannot enforce "a continuing decree" but must give the new law effect. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 437 (1855). *See also Agostini v. Felton*, 117 S.Ct. 1997, 2006 (1997) ("A court errs when it refuses to modify an injunction or

consent decree in light of [significant] changes" in the law); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992) ("A consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law."). Indeed, "[a] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).

If amending the substantive law applicable to a continuing injunction or consent decree does not violate the separation of powers, Congress surely can adopt procedures to protect the rights of parties who are entitled to the benefit of the new law. To conclude otherwise would allow the courts to frustrate the purpose of the underlying substantive law. The automatic stay provision manifests Congress' recognition that continued enforcement of structural decrees which impose obligations that exceed constitutional requirements places an undue burden on prison administrators and has potentially harmful consequences for public safety. Because administrators and the public would otherwise have no adequate remedy where a federal court continues an invalid injunction, Article III, Section 1, empowers Congress to protect the public interest by requiring a federal court to either rule or stay the decree.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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